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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-183

JAMES R. COSON, *et al.*, *Petitioners*

v.

UNITED STATES OF AMERICA, *et al.*, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No.

JAMES R. COSON, *et al., Petitioners*

v.

UNITED STATES OF AMERICA, *et al., Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, 515 F.2d 906 (9th Cir. 1975), is reprinted in the Appendix at pp. 1a-3a. The District Court (Hon. M. D. Crocker) did

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not issue an opinion; the transcript of the Court's oral ruling is reprinted in the Appendix at pp. 4a-5a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1975 (App. 3a).[1] A timely petition for rehearing *en banc* was denied on June 25, 1975. On July 21, 1975, the Court of Appeals entered an order staying issuance of the mandate pending disposition of the case by this Court, provided this petition was filed with the Court by August 1, 1975. (App. 6a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether an administrative summons under section 7602 of the Internal Revenue Code, issued prior to a recommendation for criminal prosecution, may be enforced against a taxpayer after criminal prosecution of him has been recommended, when the sole purpose of enforcement is to aid prosecution of the criminal case against him.

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reprinted in the appendix. App. 14a-15a.

STATEMENT OF FACTS

This is an Internal Revenue Service summons enforcement proceeding. Petitioners are James R. Coson, an individual, and thirteen corporations which he con-

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[1] References to the Appendix to this petition are designated "App." with a page number.

trols.[2] Recommendations for criminal prosecution have been made against petitioner Coson and two of the petitioner corporations, Fresno Brass Works and Catalina Brass Company, Inc.

Respondents are the United States of America and James A. Creagmile, Special Agent of the Intelligence Division of the Internal Revenue Service.[3] Respondents instituted this proceeding in the United States District Court for the Eastern District of California under sections 7402(b) and 7604 of the Internal Revenue Code seeking enforcement of a summons issued by Special Agent Creagmile pursuant to section 7602.[4] The summons directed petitioner Coson to produce the books and records of the petitioner corporations for the years 1968, 1969 and 1970 and to testify in connection therewith.[5]

A hearing was held in the District Court on April 4, 1973. The Court orally ordered enforcement of the

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[2] The corporations are: General Sprinkler Corporation; General Sprinkler Co., a/k/a General Controller Corporation; Fresno Brass Works; Catalina Machinery and Equipment Company, Inc.; Catalina Brass Company, Inc.; Rain-Bo Metals, Inc.; Rain-Bo Manufacturing Co.; Febco, Inc.; Foundry Products Company, Inc.; Landscape Irrigation Planning Co., Inc.; Mustang Motor Products Corporation; Sprinkler De Americana; and Buckner Industries, Inc.

[3] Special Agent Creagmile has retired and has been replaced by Special Agent Philip G. Larson.

[4] Unless otherwise noted, section references are to the Internal Revenue Code of 1954, as amended, 26 U.S.C. §§ 1 *et seq.*

[5] Prior to the issuance of the single, omnibus summons in issue, the Internal Revenue Service had inundated petitioners with 314 separate summonses demanding essentially the same materials. These were not enforced, either because the Special Agent withdrew them or because respondents refused to pay the witness fees required under Rule 45(c) of the Federal Rules of Civil Procedure.

summonses and stayed enforcement pending appeal to the United States Court of Appeals.

While the appeal was pending, petitioners were advised, by letter dated January 2, 1974, that their cases had been referred by the District Director to the Office of Regional Counsel "with a recommendation that criminal proceedings be instituted" against them for violations of the Internal Revenue laws. (App. 7a, 10a-11a.) Regional Counsel, in turn, recommended to the Department of Justice that criminal prosecution be considered, and, on May 17, 1974, petitioners were notified that "the case has been forwarded" to that agency. (App. 7a, 12.) Subsequently, counsel for petitioners was orally advised by a representative of the Department of Justice that the cases had been referred to Special Agent Larson. On September 17, 1974, Special Agent Larson wrote petitioners a letter stating (App. 8a, 13a):

> I wish to inform you that as of this date, the criminal investigations of James R. Coson, Fresno [illegible]ss Works, and Catalina Brass Company are still open. Because of this and due to the fact that the summons enforcement proceedings are pending, it is felt that we are in no position to discuss any possible civil settlements at this time.

Thus, the civil tax proceedings are presently in abeyance and the sole purpose of enforcement of the summons at this time is to gather evidence for the criminal prosecutions.

The recommendations for criminal prosecution were brought to the attention of the Court of Appeals by petitioners' Motion to Augment Record. Petitioners urged that the summons should not be enforced since

its sole purpose was now to obtain evidence for criminal prosecution. Despite the fact that the recommendations for criminal prosecution had not been made until after the District Court hearing, the Court of Appeals denied the motion upon the ground that the matter had not been presented to the District Court.

On April 17, 1975, the Court of Appeals affirmed the District Court's order enforcing the summons, although it did rule in petitioners' favor on other issues. (App. 1a-3a.) The opinion of the Court of Appeals makes no reference to the intervening recommendation for criminal prosecution. On June 25, 1975, a timely petition for rehearing *en banc* was denied. On July 21, 1975, a stay of mandate was granted, provided this petition was filed with the Court by August 1, 1975. (App. 6a.)

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve the issue whether a summons *issued before* a recommendation for criminal prosecution may legitimately be *enforced after* such a recommendation has occurred. This issue was not presented in *Donaldson* v. *United States,* 400 U.S. 517 (1971), because no recommendation for criminal prosecution had been made. When a recommendation for prosecution is made after issuance of a summons, however, this Court has indicated that the summons may no longer be enforceable. *Kyriaco* v. *United States,* 401 U.S. 922 (1971).

There is confusion and conflict in the lower courts on this issue. It is a recurring and significant issue in the administration of the tax laws, and litigation will continue to burden the federal courts until it is resolved by this Court.

1. The Use of Summonses in IRS Criminal Investigations.

Section 7602 summonses are commonly used in criminal tax investigations to command the production of documents or testimony; they are enforceable by court order. *See* sections 7402(b), 7602 and 7604 (App. 14a-15a.) Criminal tax investigations are conducted by Special Agents of the Intelligence Division of the Internal Revenue Service. Civil audit activity is normally suspended while the Special Agent—functioning as a "cop in business clothes"—conducts his investigation. If he determines that a criminal violation has occurred, he summarizes his findings in a Special Agent's Report which he submits to the District Director with a recommendation for criminal prosecution.

If the District Director concurs in the Special Agent's Report, the case is sent to the appropriate Regional Counsel's office with a recommendation for criminal prosecution. If Regional Counsel agrees, the case is referred to the Department of Justice with a recommendation that criminal prosecution be considered. If further evidence is required thereafter, the Department of Justice may instruct the United States Attorney to call witnesses before the grand jury and utilize grand jury subpoenas consistently with the Federal Rules of Criminal Procedure.

2. Under *Donaldson* a Summons Should Not Be Enforced if Criminal Prosecution Is Recommended After Issuance of the Summons.

In *Donaldson* v. *United States, supra,* this Court reaffirmed the principle—announced in *Reisman* v. *Caplin,* 375 U.S. 440, 449 (1964)—that a section 7602 summons may not be used "for the improper purpose of obtaining evidence for use in a criminal prosecution

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. . . ." Prior to the *Donaldson* decision, there had been a rising tide of litigation contesting the role of Special Agents in tax investigations. Taxpayers were resisting enforcement on the ground that Special Agents were concerned solely with obtaining evidence for use in criminal prosecutions. The Court in *Donaldson* refused to find that evidence was being obtained for use solely in a criminal prosecution simply because a Special Agent had appeared on the scene. To find otherwise, the Court stated, would require the Service "to forgo either the use of the summons or the potentiality of an ultimate recommendation for prosecution." 400 U.S. at 536. It was in this context that the Court concluded that "under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution." *Id.*

The issue in the instant case—whether a summons may legitimately be enforced if the recommendation for prosecution is made *subsequent* to issuance of the summons—was not before the Court in *Donaldson*. The principles of *Donaldson* apply with full force, however, to an outstanding summons after a recommendation for criminal prosecution has been made. At that point, the case changes from a tax investigation to a tax prosecution, and the "sole objective" of enforcing the summons is to "obtain evidence for use in a criminal prosecution." 400 U.S. at 533.

Contemporaneously with its decision in *Donaldson*, this Court indicated that a summons may not be enforceable when a recommendation for prosecution has been made subsequent to issuance. At that time the Court had before it another summons enforcement case raising the "improper criminal purpose" issue.

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Kyriaco v. *United States,* No. 448, O.T. 1970. After the petition had been filed with the Court in *Kyriaco,* the Internal Revenue Service referred the criminal case to the Department of Justice. This fact was brought to the attention of the Court. Supplemental Memorandum for the Petitioners, *Kyriaco* v. *United States.* Almost simultaneously with its decision in *Donaldson,* the Court denied the petition in *Kyriaco* "without prejudice . . . to applications . . . to the District Court for such relief, if any, as may be appropriate in the light of developments occurring since the petition for a writ of certiorari was filed in this Court." 401 U.S. 922 (1971). The Court's statement strongly suggests that an intervening recommendation for criminal prosecution must be taken into account under *Donaldson.*

In subsequent proceedings in *Kyriaco,* the District Court refused to enforce the summons on the ground that doing so would violate the rule laid down in *Donaldson:*

> It strains the meaning of the Court to conclude . . . that motive at the time of issuance is the ultimate fact, requiring enforcement irrespective of what subsequently occurs. Implicit in the validity of a summons is the use to which the information obtained is to be put. Issuance is only the prelude to enforcement. It is the use of the information sought that has concerned the courts that have considered this question, and certainly the language of *Donaldson, supra,* can only be read in that context even though issuance was the factual situation in which the question was presented. [*United States* v. *Kyriaco,* 326 F. Supp. 1184, 1185-86 (C.D. Cal. 1971).]

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The District Court's application of the principles of *Donaldson* to the new facts of *Kyriaco* properly interpreted this Court's rulings and should govern this case, for, once again, a referral to the Department of Justice has intervened between issuance and enforcement of a section 7602 summons.

The heart of the administrative summons procedure is not the *issuance* of a summons but the *obtaining* of summoned documents or testimony by compulsory process. Use of the courts to obtain evidence for a criminal case by enforcement of administrative summonses is clearly improper. As this Court pointed out in *United States* v. *Powell,* 379 U.S. 48, 58 (1964), "it is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused." The clear teaching of *Donaldson* and *Powell* is that it is improper for a court to compel production once a recommendation for criminal prosecution has occurred.

Nor should the Department of Justice be permitted to use Special Agent Larson as a "cat's-paw" to gather additional evidence for the criminal case. In *Abel* v. *United States,* 362 U.S. 217, 226 (1960), this Court specifically condemned "the deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case . . . ." The lower courts have implemented this rule by forbidding the use of an IRS section 7602 summons to aid the United States Attorney or the Department of Justice. *United States* v. *Henry,* 491 F.2d 702 (6th Cir. 1974) (§ 7602 summons may not be used to gather evidence to assist pending narcotics prosecution); *United States* v. *Zack,* 375 F. Supp. 825 (D. Nev. 1974) (§ 7602 summons may not be used as substitute for search war-

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ran[*]; *United States* v. *O'Connor,* 118 F. Supp. 248 (D. Mass. 1953) (§ 7602 summons may not be used to gather evidence for a pending prosecution). As Judge Wyzanski explained in *O'Connor:*

> To encourage the use of administrative subpoenas as a device for compulsory disclosure of testimony to be used in presentments of criminal cases would diminish one of the fundamental guarantees of liberty. Moreover, it would sanction perversion of a statutory power. [118 F. Supp. at 251].

To summarize, the Internal Revenue Service referred this case to the Department of Justice with a recommendation that criminal prosecution be considered. The civil proceedings are in abeyance while the criminal cases are being pursued. Under the principles enunciated in *Donaldson* and *Kyriaco,* the "sole objective" of enforcement of the outstanding section 7602 summons at this time would be to "obtain evidence for use in a criminal prosecution". Enforcement of the summons would thus constitute an "abuse of process" under *Powell.* Accordingly, the summons should not be enforced.

3. Lower Federal Courts Are in Conflict on Whether a Summons May Be Enforced After a Recommendation for Criminal Prosecution.

There is conflict and confusion in the lower courts on whether the validity of a summons is to be tested according to the facts at the time of enforcement or at the time of issuance.

a. *Time of Enforcement.* Courts of Appeals of two Circuits have held that a summons may not be enforceable when there has been an indictment or recommen-

* Reversed and remanded for hearing on criminal purpose issue. ___ F.2d ___, No. 74-2467 (9th Cir., July 16, 1975), BNA Daily Tax Report (July 30, 1975), p. H-4.

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dation for criminal prosecution subsequent to issuance. In *United States* v. *Monsey,* 429 F.2d 1348 (7th Cir. 1970), an indictment was filed against respondent during the pendency of enforcement proceedings. The Court of Appeals for the Seventh Circuit stated that "enforcement of the summonses under the present circumstances would serve primarily as an aid to the current criminal prosecutions." 429 F.2d at 1351. The Court explained that:

> Events subsequent to administrative issuance may change circumstances to such an extent that enforcement of a summons may bring about improprieties. Such equitable considerations demand that the court consider intervening occurrences as well as the status quo at the date of issuance. These principles call here for consideration of the supervening indictment. . . . [*Id.*]

The Tenth Circuit applied the same rule in *United States* v. *Billingsley,* 469 F.2d 1208 (10th Cir. 1972). Remanding the case to the District Court for further proceedings on the validity of a summons, the Court stated that:

> . . . the District Court should also consider any new developments subsequent to appellants' notice of appeal such as the institution of a criminal prosecution . . . *or the referral of* [*the*] *case to the Department of Justice. See* Kyriaco v. United States, 401 U.S. 922 . . .; United States v. Kyriaco, C.D. Cal., 326 F. Supp. 1184." [469 F.2d at 1210; emphasis added.].

b. *Time of Issuance.* Decision of the Ninth Circuit, below, and the Second, Sixth and Eighth Circuits are in conflict with the decisions of the Seventh and Tenth Circuits. In *United States* v. *Cromer,* 483 F.2d

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99 (9th Cir. 1973), and *United States* v. *Weingarden,* 473 F.2d 454 (6th Cir. 1973), the courts refused to take intervening recommendations for criminal prosecution into account in enforcing the summonses. 483 F.2d at 101; 473 F.2d at 461. The Second Circuit upheld enforcement of a summons even though there had been an intervening indictment. *In Re Magnus, Mabee & Reynard, Inc.,* 311 F.2d 12, 16 (2d Cir. 1962), *cert. denied,* 373 U.S. 902 (1963). *See also United States* v. *Giordano,* 419 F.2d 564, 568, n.5 (8th Cir. 1969), *cert. denied,* 397 U.S. 1037 (1970) (dictum).

c. *There is Intolerable Uncertainty in the Lower Courts.* Other decisions by the Courts of Appeals for the Seventh, Ninth and Tenth Circuits have rendered the law uncertain and unworkable.

In the decision below, the Ninth Circuit did not address the issue at all. In its earlier decision in *Cromer, supra,* the Court did not even cite *Kyriaco, supra.* Moreover, another District Court in the Ninth Circuit recently ignored *Cromer* and relied upon *Kyriaco* in refusing to enforce a summons issued after a search warrant had been used to obtain comparable materials from the same taxpayer. *United States* v. *Zack, supra.*

The Seventh Circuit, in *United States* v. *Moriarity,* 435 F.2d 747 (7th Cir. 1970), without overruling or disapproving its earlier decision in *Monsey, supra,* permitted enforcement of a summons where tax evasion indictments were returned several days prior to the enforcement order. Then, in *United States* v. *Awerkamp,* 497 F.2d 832 (7th Cir. 1974), the Seventh Circuit—in a case where no recommendation had been made—stated the rule in a manner which appears

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clearly to require consideration of a recommendation for prosecution, made subsequent to issuance of a summons, in determining whether to enforce it. The Court said:

> In Donaldson v. United States . . . the Supreme Court held that "Congress clearly has authorized the *use of the summons* in investigating what may prove to be criminal conduct" *up until the point* "where the sole objective of the investigation is to obtain evidence for use in a criminal prosecution. . . ." *This point is reached when a recommendation for criminal prosecution is made.* [497 F.2d at 834; emphasis added.]

In *United States* v. *Hodgson,* 492 F.2d 1175 (1974), the Tenth Circuit permitted enforcement of a summons where a recommendation for prosecution was being considered within the Internal Revenue Service but had not yet been referred to the Department of Justice. It relied upon its prior decision in *Billingsley, supra*, yet stated in dictum, inconsistently with *Billingsley,* that "the validity of a summons is tested as of the date of issuance." 492 F.2d at 1177.

In sum, there is sharp conflict and considerable confusion among the lower federal courts on how to apply this Court's decision in *Donaldson* and its statement in *Kyriaco.* The Court should grant the petition and rule that a summons may not be enforced once a recommendation for criminal prosecution has been made. For, once there is a recommendation, the use of administrative summonses to gather criminal evidence is fundamentally unfair. Our Constitution, statutes and traditions establish procedures for the compulsory production of evidence for use in criminal proceedings. Those procedures are carefully defined to protect rights of the accused. The use of administrative summonses to

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gather evidence for use against an accused is incompatible with those procedures. Taxpayers will continue to resist erosion of their rights, the sound administration of our tax system will be impaired and the burden on the courts will continue until the present conflict is resolved by this Court.

For the foregoing reasons, the Court should issue a writ of certiorari to review the opinion and judgment of the Court of Appeals.

Respectfully submitted,

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